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No. 90-871

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT, ET AL.
Petitioners,

v.

MASHANTUCKET PEQUOT TRIBE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT

The United States has submitted a brief (hereinafter, U.S. Brief) at the invitation of this Court, expressing its view that this Court should not grant Connecticut's Petition for Writ of Certiorari. This brief is submitted in reply thereto as a Supplemental Brief pursuant to U.S. Supreme Court Rule 15.7.

I. CONTRARY TO THE SOLICITOR GENERAL'S POSITION, THE INDIAN GAMING REGULATORY ACT (IGRA) DOES NOT REQUIRE A STATE TO NEGOTIATE OVER THE INTRODUCTION OF GAMING THAT STATE LAW PROHIBITS.

The essence of the Solicitor General's argument is that under the State's interpretation of the Indian Gaming Regulatory Act, all "the State's substantive laws apply of their own force," U.S. Brief at 11, and the State would therefore never have to negotiate over the applicability of state law to any proposed Class III gaming. This interpretation, the Solicitor General alleges, would render the statutory negotiating process "meaningless, because there would be nothing for the State and the Tribe to negotiate *about*." *Id.* (Emphasis in the original.)

The Solicitor General's argument misconstrues the statute, the State's position in this case, and the State's good faith in negotiating and litigating all relevant gaming issues under the statute.

A. The Act Does Not Require That The Threshold Issue Of The Legality Of The Proposed Form Of Gaming Be Resolved Through The Compact Negotiation Process.

Contrary to the Solicitor General's allegation, Connecticut has never insisted that all of its substantive laws "apply of their own force" and are therefore non-negotiable. Under the compact between the Tribe and Connecticut, a number of provisions of the State's criminal law and regulatory powers

are to be applied. Indeed, the only issue of state law that Connecticut sought to resolve prior to negotiating was the threshold question whether the type of gaming requested by the Tribe was prohibited by state law and therefore not permissible in the first place under the Act.[1] The permissibility of commercial casino gaming in Connecticut is a purely legal question that is not susceptible to resolution through negotiation.

On the other hand, the Solicitor General urges a construction of IGRA that requires this fundamental, threshold legal issue to be settled through negotiation. U.S. Brief, p. 11. This interpretation cannot be readily squared with the statutory language, which states that Class III gaming activities are lawful on Indian land only if the State permits "such gaming", 25 U.S.C. § 2710(d)(1)(B), and then only if the particular gaming is authorized by a Tribal ordinance, 25 U.S.C. § 2710(d)(1)(A), and is conducted pursuant to a negotiated Tribal-State compact. 25 U.S.C. § 2710(d)(1)(C). *See* U.S. Brief, p. 11.

The Solicitor General's construction turns the statute on its head, requiring the State to negotiate the compact before resolving the threshold question whether the gaming requested by the Tribe would be lawful and permitted in the first place under the Act. This conflicts with the Solicitor General's description of the operation of IGRA, U.S. Brief, p. 3 ("if the State does not permit 'such gaming', that is the end of the matter"), and makes little sense. By requiring that the threshold legal issue be the subject of negotiation, the Solicitor General would have the statutory question of whether the requested gaming is lawful turn not on the proper interpretation of State law but on the vagaries of the negotiation process.[2]

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[1] As the lower courts recognized, Connecticut readily admitted that other forms of Class III gaming (e.g., lottery, off-track betting, etc.) were negotiable under IGRA, since State law permitted "such gaming". *See* Pet. App., 8A, 24A.

[2] The language of 25 U.S.C. § 2710(d)(5) quoted by the Solicitor General does not support his position. That section states that Indian tribes may

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Connecticut maintains that, while IGRA is designed to permit Tribes to engage in gaming activity in a State where such activity is permitted, 25 U.S.C. § 2710(d)(1), it does not assign the resolution of this threshold issue to the negotiating process. Connecticut is entitled under IGRA to litigate the legal issue of the permissibility of casino gaming under State law, rather than being required to resolve it through negotiation.[3]

This is not to say, as the Solicitor General posits, that Connecticut believes that ". . . the State may turn its back on a negotiation request . . ." presented by a tribe pursuant to IGRA. U.S. Brief, p. 12. Connecticut has never espoused such a position. Both the District Court and the Court of Appeals acknowledged the State's flexibility[4] in this regard and noted that Connecticut had not acted in bad faith. Pet. App., 7A-8A, 22A, 24A, 42A. The State candidly responded to the Tribe's request by indicating that the permissibility of casino gambling, while not negotiable, was litigable.

The Solicitor General seems to suggest that, instead of litigating the permissibility of commercial casino gaming, the State could have largely achieved its goal by insisting upon

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[2](continued)

regulate Class III gaming on their lands "except to the extent that such regulation is inconsistent with, or less stringent than, *the State laws and regulations made applicable by any Tribal-State compact* entered into by the Indian tribe . . ." *See* U.S. Brief, pp. 11-12 (emphasis supplied by U.S. Brief). This language suggests only that certain State laws and regulations may be part of a compact. It does not suggest that the threshold issue of whether the gaming requested by the Tribe is permitted under State law, and therefore is lawful under IGRA, must be resolved through compact negotiations..

[3] Connecticut does not assert, however, that a State is free to simply fabricate a phantom issue of permissibility, for IGRA provides that a State is held to the rigid standard of good faith. *See* discussion, *infra* at p. 6-8.

[4] Connecticut timely responded to the Tribe's request, acknowledged the negotiability of other forms of gaming which are legal in the State and offered to litigate the issue of whether commercial casino gaming is permissible under State law before IGRA jurisdiction has matured. Pet. App., 8A, 24A.

draconian limitations on casino gaming in its negotiations with the Tribe. The implication is that the State should have insisted upon these limitations if it were serious about its concern over the unwanted arrival of casino gaming. U.S. Brief, pp. 8, 12.

In the first place, the District Court ordered the State to enter negotiations (Pet. App., p. 37A) while the litigation was still pending. Thus, Connecticut was compelled into a negotiating process which was distorted by the fact that the threshold legal issue of permissibility of casino gaming remained unresolved. At the same time, the State had a continuing duty to protect the health, safety and welfare of its citizens. In an attempt to balance these competing interests, Connecticut determined that it would continue to litigate the permissibility of casino gaming, while negotiating to secure the Tribe's agreement to a pervasive regulatory presence by the State if casino gaming was to occur on the reservation.[5] This was a responsible and understandable approach – more reasonable than the Solicitor General's apparent position that the State, in essence, should have stonewalled the Tribe in negotiations rather than litigate the permissibility of commercial casino gaming prior to entering negotiations.

We submit that the lower courts were incorrect that Connecticut, under the terms of IGRA, had only one choice when presented with the Tribe's request – to negotiate the permissibility of casino gaming. This Court should grant the Petition to address this issue.

B. The *Cabazon* Rationale Has Been Wrongfully Applied.

The Solicitor General wrongly asserts that the legality of Class II and Class III gaming under IGRA is identical.

[5] Had the State submitted a compact which placed severe limitations upon the size and scope of the casino operations, in essence, relitigating the threshold issue in the negotiations, the Tribe undoubtedly would not have agreed to State regulatory and criminal jurisdiction on the reservation. The Tribe would have submitted a very different, more limited compact (continued)

See U.S. Brief, p. 3. IGRA provides that ". . . [a]n Indian tribe *may engage* in . . . Class II gaming on Indian lands . . . if . . . "the conditions of permissibility under state law and ordinance adoption are satisfied. 25 U.S.C. § 2710(b)(1) (emphasis added). Indeed, the Solicitor General acknowledges that there is an "automatically permitted" quality to Class II gaming. U.S. Brief, P. 14. There is no such automatic permission for Class III gaming. The Act provides that "Class III gaming activities *shall be lawful* on Indian lands *only if* . . ." the three conditions of ordinance adoption, permissibility and Compact conformity are satisfied. 25 U.S.C. § 2710(d)(1) (emphasis added). The Solicitor General's brief makes it appear that the "only if" language appears in IGRA with reference to both Class II and Class III gaming, U.S. Brief, p. 3, but it does not. The State refers to this difference in prefatory language in its Petition, alleging that the lower courts' analysis was deserving of review since it excluded "other pertinent statutory language which demands consideration." Pet., p. 15.

The Solicitor General concludes that IGRA codifies this Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). U.S. Brief, p. 13. *Cabazon* addressed whether P.L. 280,[6] which was designed to permit a State to impose its criminal laws upon an otherwise sacrosanct Indian reservation, could be used to prevent high-stakes bingo by the Tribe. The Senate Report, relied upon by the

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[5] (continued)

leaving the State exposed to the risk that the mediator would choose the Tribe's compact and thereby preclude the State even from exercising regulatory authority over the proposed casino. State officials could not afford to run that risk.

[6] 18 U.S.C. § 1162, 28 U.S.C. § 1360.

Government in its brief, clearly directs that the *Cabazon* prohibitory/regulatory distinction be employed in deciding if "class II games are allowed in certain States." U.S. Brief, p. 13.[7]

Clearly then, Congress adopted the *Cabazon* test in IGRA, but only to determine if a Class II activity is permitted.[8] Regarding Class III, the Act stands alone with its language and arrangement as the guide. Congress intended that the *Cabazon* test was not to be used in a situation which could result in the imposition of State criminal laws upon a reservation, which, of course, can be the result of a Tribal-State compact under IGRA.

This is not a P.L. 280 case. This is an IGRA Class III gaming case. Therefore, the interpretation of "such gaming" in Class II cases such as *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (1990), and *United Keetowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, No. 87-2797 (10th Cir. Mar. 14, 1991), relied upon by the Government, is not instructive.

C. The State's Good Faith Must Be Considered.

The Solicitor General asserts that "the Tribe is entitled to judicial relief under IGRA only if the State has failed to negotiate in good

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[7] Even if the *Cabazon* test applied, the fact that Connecticut permits certain types of gaming would not make the State's absolute prohibition of commercial casino gaming "regulatory" in nature under *Cabazon*. *See* Pet., pp. 15-16.

[8] "The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of federal law, to either allow or prohibit certain activities. The Committee does not intend for S. 555 to be used in any way to subject Indian tribes or their members who engage in class II games to the criminal jurisdiction of States in which criminal laws prohibit class II games." S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988).

faith, IGRA affords the Tribe no further protection." U.S. Brief, p. 10 (emphasis supplied in original). The implication is clear. Connecticut acted in bad faith by not engaging in negotiations, despite its reasonable conviction that commercial casino gaming is not "such gaming" permitted under state law. Had it advanced this position in negotiations, rather than in litigation, the State could have deprived the Tribe of the opportunity to show bad faith and thus challenge the State's actions in court.

The Solicitor General's position demonstrates that the question of whether Connecticut acted in good faith is inextricably interwoven with the issue of what constitutes "such gaming" under the Act.[9] The Court of Appeals determined that the issue of good faith need not be considered since the State had refused to negotiate over casino gaming (Pet. App. 21A-22A). However, such a view gives no consideration to the plain meaning of the surrounding statutory language. 25 U.S.C. § 2710(d)(7)(B)(ii) clearly provides that the court must consider if a State . . . "did not respond to such a request [to negotiate] in good faith, . . ." Subsection (iii) goes on to provide that "[i]f, . . ., the court finds that the State has failed to negotiate in good faith . . ." it may then order 60-day negotiations and, failing that, may appoint a mediator. The District Court made no such finding. Pet. App. 23A to 44A. On the contrary, it held that the position and arguments of the State "are far from frivolous and present a question deserving of appellate consideration . . . ." Pet. App. 42A. Nonetheless, the District Court issued a mandatory sixty day order. Pet. App., 37A.

Failure to find a lack of good faith on the part of the State, we submit, was error on the part of the District Court which should be reviewed by this Court. "At its option . . . the Court

[9] While Connecticut has not specifically listed the State's good faith as an issue to be considered by this Court, the parties may enlarge upon the questions presented as long as the enlargement may be deemed fairly included or comprised within the stated question. Cf. U.S. Supreme Court Rule 24.1(a). *See also, Lake Country Estates, Inc. v. Tahoe Regional Planning*, 440 U.S. 391, 398 (1979).

may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." U.S. Supreme Court Rule 24.1(a).

With reference to the good faith of a State the proper standard to be applied is whether the law at issue "was clearly established at the time an action occurred." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The provisions of IGRA relating to Class III gaming, and a State's responsibility thereunder, were anything but clear when the State expressed its view that commercial casino gaming was not a proper subject of negotiation, a position "far from frivolous . . . and deserving of appellate consideration."

Since the Solicitor General has expressed his viewpoint on the issue of the good faith of Connecticut, this Court should decide if IGRA required the District Court to find that Connecticut acted in the absence of good faith before issuing a compulsory order to negotiate.

II. THE REQUIREMENT THAT A TRIBAL ORDINANCE BE ADOPTED PRIOR TO NEGOTIATIONS IS DESIGNED TO PROTECT THE SOVEREIGNTY OF THE TRIBE AND THE STATE.

IGRA 25 U.S.C. § 2710(d)(1) provides that before Class III gaming may occur upon a reservation three conditions (listed in order of appearance in the statute) must be satisfied: (1) adoption of a Tribal Ordinance; (2) location in a State which permits such gaming; and (3) conformity with a Tribal-State compact.

The Solicitor General and the lower courts find nothing in the statute which demands *sequential satisfaction* of these conditions and the government asserts it would make "little

sense" to interpret the ordinance provision as preconditional. U.S. Brief, p. 18. But the wording of the statute itself demands this interpretation. The conditions not only are listed in sequence, but in a different sequence than those governing Class II gaming. Congress specifically placed the requirement of a tribal ordinance ahead of the provisions concerning compact negotiations.

This interpretation also comports with Congress' concern about Tribal sovereignty and with common sense. It is up to the Tribe as a sovereign entity to make the determination that it wants to introduce an activity on its reservation which is fraught with inherent dangers[10] before entering a statutory process that can result in a surrender of a portion of Tribal sovereignty[11] In this manner, the resources of both the Tribe and the State need not be expended in a process which might prove needless and wasted if the Tribe later decides that it does not want casino gaming upon its reservation.[12]

By allowing the lower court ruling in this case to stand, this Court would send the message that any request for gaming by a tribal leader triggers the entire IGRA negotiating process – an interpretation that is potentially wasteful and unreasonable.

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[10] "The purpose of this Act [IGRA] is . . . (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences. . . . ." 25 U.S.C. § 2702(2).

[11] Indeed the Compact presently pending before the Secretary of the Interior permits the imposition of Connecticut criminal law upon the reservation.

[12] Contrary to the Solicitor General's assertion, there is nothing to suggest that the "Tribe" (as opposed to some leaders) has directed that negotiations take place or "tentatively committed" to casino gambling on its reservation. U.S. Brief, p. __. To our knowledge, the enabling ordinance required by 25 U.S.C. § 2710(d)(2)(C) has not yet been either adopted or submitted for approval.

CONCLUSION

These issues raised in the Solicitor General's brief are of continuing significance to Connecticut and other States and should be decided by this Court. For all of the foregoing reasons, petitioners respectfully submit that this Petition should be granted and a Writ of Certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

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